Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

No. 76-118

In the Supreme Court of the United States

OCTOBER TERM, 1976

DALLAS NORMAN HOUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-118

DALLAS NORMAN HOUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly excluded expert testimony concerning the different species of marihuana.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possession of marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and importation of marihuana, in violation of 21 U.S.C. 952(a). He was sentenced to five years' imprisonment on each count, to be served concurrently, and five years' special parole. The court of appeals affirmed *per curiam* on May 7, 1976 (Pet. App. A2), and denied a petition for rehearing with suggestion for rehearing *en banc* on June 16, 1976 (Pet. App. A3). The petition for a writ

of certiorari was filed on July 26, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence at trial showed that in August 1974 petitioner imported approximately 10,000 pounds of marihuana into the United States from South America. The government's witnesses included Charles Clark, a forensic chemist with the Drug Enforcement Administration, who identified the material seized from petitioner's airplane as marihuana. Although Clark did not specify the particular species of the plant, he testified that it contained tetrahydrocannabinol (THC), the active ingredient in marihuana, which he termed the substance that "makes marihuana what it is." Petitioner then sought to call a botanist to substantiate his so-called "specie defense," *i.e.*, that the federal statute defining marihuana refers to Cannabis sativa L. (21 U.S.C. 802 (15)); that, although botanists know that there are several separate species of the plant, there are at present no reliable chemical or spectrographic methods for distinguishing among them; and that it is therefore impossible to prove beyond a reasonable doubt that petitioner imported or possessed the particular species of marihuana proscribed by the statute. After hearing petitioner's offer of proof, the district court excluded the testimony.

Petitioner contends (Pet. 6-19) that the district court erred by refusing to allow his expert witness to testify and thus by determining that all species of marihuana are included within the statutory definition. Petitioner's "specie defense" was irrelevant to the issues at trial, however, since Congress clearly intended to prohibit the importation or possession of every species of marihuana, each of which produces the same hallucinogenic effect. This defense has been uniformly rejected by the ten courts of appeals that have considered it. See

United States v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948; *United States* v. *Rothberg*, 480 F. 2d 534 (C.A. 2), certiorari denied, 414 U.S. 856; *United States* v. *Moore*, 446 F. 2d 448 (C.A. 3), certiorari denied, 406 U.S. 909; *United States* v. *Sifuentes*, 504 F. 2d 845 (C.A. 4); *United States* v. *Gaines*, 489 F. 2d 690 (C.A. 5); *United States* v. *Dinapoli*, 519 F. 2d 104 (C.A. 6); *United States* v. *Gavic*, 520 F. 2d 1346 (C.A. 8); *United States* v. *Kelly*, 527 F. 2d 961 (C.A. 9); *United States* v. *Spann*, 515 F. 2d 579 (C.A. 10); *United States* v. *Walton*, 514 F. 2d 201 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

DOJ-1976-10